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**IN THE
COURT OF APPEALS OF INDIANA**

CARLOS C. ROSE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A04-0612-CR-720

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49C01-0605-FD-159074

July 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Carlos Rose appeals his convictions for Domestic Battery,¹ a class D felony, and Domestic Battery,² a class A misdemeanor. Specifically, Rose argues that the class A misdemeanor conviction must be vacated because “that conviction was obtained through the same evidence that supported [the] class D felony domestic battery conviction.” Appellant’s Br.³ Concluding that convicting Rose on both charges violates the prohibition against double jeopardy, we reverse Rose’s conviction on the class A misdemeanor charge. Thus, we remand this cause to the trial court with instructions that it vacate Rose’s conviction and sentence on that offense.

FACTS

On August 11, 2006, at approximately 1:00 p.m., Rose arrived at Tabell Williams’s house in Indianapolis to deliver a birthday gift for their daughter. After handing the gift to Williams, Rose refused to leave the residence. As a result, Williams threatened to call the police and walked toward a bedroom to use a telephone. Rose followed Williams, grabbed her, and lifted her off the ground. Rose then bit Williams on the cheek, threw her on a couch, and grabbed her arms. Williams’s son, who was under sixteen years old, witnessed the events and called the police. However, Rose fled the residence before the officers arrived.

On August 28, 2006, the State charged Rose with the above offenses, an additional

¹ Ind. Code § 35-42-2-1.3.

² Id.

³ The pages of Rose’s appellate brief are not sequentially numbered.

count of battery, and one count of interfering with reporting a crime. Following a bench trial on November 6, 2006, Rose was convicted on all three battery counts. Thereafter, the trial court vacated the battery conviction, “finding that the testimony as to what occurred on this incident . . . was identical to that presented on the other two batteries.” Tr. p. 64. The trial court then sentenced Rose to two years on the class D felony domestic battery charge, with 550 days suspended and 180 days executed, and to one year on the class A misdemeanor domestic battery conviction with the entire sentence suspended. The trial court ordered the sentences to run concurrently with each other. Rose now appeals.

DISCUSSION AND DECISION

In determining whether Rose’s conviction for class A misdemeanor battery must be vacated, we note that Article I, section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” Our Supreme Court has determined that two or more offenses are the “same offense” in violation of the Indiana Constitution where, with respect to either the statutory elements of the challenged offense or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Richardson v. State, 717 N.E.2d 32, 56 (Ind. 1999). To establish a violation under the actual evidence test, a defendant “must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Id. at 53. When convictions violate double jeopardy principles, a reviewing court must vacate the crime with

the less severe penal consequence. Id. at 54.

Indiana Code section 35-42-2-1.3 defines class D felony domestic battery as follows:

(a) A person who knowingly or intentionally touches an individual who:

- (1) is or was a spouse of the other person;
- (2) is or was living as if a spouse of the other person as provided in subsection (c); or
- (3) has a child in common with the other person;

in a rude, insolent, or angry manner that results in bodily injury to the person described in subdivision (1), (2), or (3) commits domestic battery, a Class A misdemeanor.

(b) However, the offense under subsection (a) is a Class D felony if the person who committed the offense:

- (1) has a previous, unrelated conviction:
 - (A) under this section (or IC 35-42-2-1(a)(2)(E) before its repeal); or
 - (B) in any other jurisdiction, including a military court, in which the elements of the crime for which the conviction was entered are substantially similar to the elements described in this section; or
- (2) committed the offense in the physical presence of a child less than sixteen (16) years of age, knowing that the child was present and might be able to see or hear the offense.

(Emphases added).

In this case, the evidence demonstrated that Rose and Tabell have a child together. Tr. p. 4. Additionally, Tabell's son, who is under sixteen years old, watched Rose hit her and called the police. Id. at 4, 12-13. Thus, the evidence was sufficient to sustain Rose's conviction for class D felony domestic battery. At the sentencing hearing, the trial court recognized that the testimony for battery was "identical to that presented in the other two batteries" and vacated the conviction. Id. at 64. However, the State acknowledges—and we

agree—that the two domestic battery convictions arose from the same factual circumstances. In other words, Rose’s convictions on both offenses were based upon the same evidence. Hence, the two domestic battery offenses were the same, and Rose was therefore put in jeopardy twice for the same offense in violation of Article I, section 14 of the Indiana Constitution. Therefore, Rose’s convictions for both offenses cannot stand. Richardson, 717 N.E.2d at 54. As a result, we remand this cause to the trial court with instructions that it vacate Rose’s conviction and sentence on the class A misdemeanor domestic battery count.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and CRONE, J., concur.